No. 74-1484

Supreme Court, U. S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1974

FRANK QUINTANA,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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May 23, 1975

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

FRANK QUINTANA,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

The petitioner, Frank Quintana, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of New Mexico entered in this proceeding on April 2, 1975.

OPINION BELOW

The New Mexico District Court, First Judicial District, entered its Judgment and Sentence September 27, 1973. The New Mexico Court of Appeals affirmed the conviction in an opinion

filed April 2, 1975. (A dissenting opinion was filed in the case.) The opinion is reported in 14 N.M. State Bar Bulletin and Advance Opinions 678, ____ N.M. ____ (N.M. App. 1975). Thereafter, the New Mexico Supreme Court denied a petition for a writ of certiorari to the Court of Appeals on May 1, 1975. The Judgment and Sentence, majority and dissenting opinions in the Court of Appeals, and Order of the Supreme Court appear in the Appendix hereto.

JURISDICTION

The opinion of the New Mexico Court of Appeals was filed April 2, 1975. A timely petition for writ of certiorari was denied by the New Mexico Supreme Court on May 1, 1975. This petition was filed within 90 days of May 1, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Whether the search warrant, execution of which resulted in Petitioner's arrest and conviction, failed to describe with sufficient particularity the items to be seized and thus violated Petitioner's Fourth Amendment right to be free of unreasonable searches and seizures, as applied to the states through the due process clause of the Fourteenth Amendment of the United States Constitution. A copy of the search warrant appears in the Appendix hereto.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, Section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On December 6, 1972, Officers Miller and Montoya obtained, by means of an affidavit of the same date, a search warrant for the premises at 331 Garfield, Santa Fe, New Mexico, the headquarters of the El Vicio Methadone Maintenance Program. This drug treatment center has legal authority to have methadone on its premises. Methadone is a controlled substance under New Mexico law. The warrant purported to authorize the search of the building at 331 Garfield "and any appurtenant structures thereto and any and all automobiles which may be found on the premises at the time of the search and of any persons who may enter upon said premises or may be found there at the time of the search for any and all controlled substances which may be kept there contrary to law . . . ." A copy of the warrant and supporting affidavit are included in the Appendix hereto. Pursuant to the warrant, other law enforcement officers went to the premises the following morning, December 7, 1972.

Officer Ortiz drove to the location, accompanied by two other plainclothes police, circled the block, parked, and waited. Surveillance of the building was maintained for several minutes, until the arrival of the petitioner. Mr. Quintana arrived, parked, got out of his car, went to and unlocked the front door at 331 Garfield, entered, and closed and latched the door behind him. Petitioner, Mr. Quintana, was the director of the Maintenance Program. As Mr. Quintana was going toward the door,

Officer Ortiz was behind him approaching the building but had not yet said anything to Mr. Quintana.

Then Officer Ortiz mounted the steps, knocked, announced his purpose in being there, and looked into the building through a small window at the petitioner. At this time Mr. Ortiz observed Mr. Quintana go quickly toward the back of the room, crouch, remove objects from his pockets which appeared to be two tin-foil packets, place the packets under a heater, and apparently light a small piece of paper. Petitioner had refused entry to the police.

Next the officers forced their way through the door, went to the heater, retrieved two tin-foil packets from underneath it, opened a packet to examine its contents, determined that it appeared to contain heroin, kept the items, and arrested petitioner. The tin-foil packets were later identified as containing heroin and were introduced by the State at trial.

Quintana was indicted December 8, 1972 for trafficking in heroin, a controlled substance, in violation of Sec. 54-11-20 N.M.S.A. (Supp. 1973).

A motion to suppress the evidence obtained under the search warrant was filed December 28, 1972. (A copy of the motion is included in the Appendix.) Among the grounds alleged in support of the motion were:

> "The warrant is insufficient on its face."
>
> "The search was unreasonable and without authority of law."
>
> ". . . said search and seizure was illegal, or in the alternative, unreasonable, in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution." (R. 6, 7)

A hearing on the motion was held August 17, 1973. (R. 196-300) The court reserved ruling, requesting memoranda from counsel. The motion was denied and at the commencement of

the trial on September 17, 1973 was renewed orally. (R. 48, 306-307)

> "I would like to file with the Court . . . a trial motion to renew our motion to suppress the real evidence in this case obtained by search and seizure." (R. 306, 307)

Motion was denied (R. 310) and the trial proceeded. (A copy of the trial motion is included in the Appendix.)

Petitioner was convicted by a jury on September 19, 1973. The conviction was affirmed by the Court of Appeals on April 2, 1975. Denial of the motion to suppress evidence obtained under the search warrant was raised on appeal. Invalidity of the warrant under the Fourth and Fourteenth Amendments, as a "general warrant" was fully argued in the New Mexico Court of Appeals. The Court of Appeals rejected petitioner's argument, holding that "the items to be searched for and seized in the case before us were as precisely identified in the warrant as the situation permitted."

Validity of the warrant was raised in the Petition for Writ of Certiorari filed in the New Mexico Supreme Court which was denied May 1, 1975.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN MARRON v. UNITED STATES.

Almost fifty years ago, this Court, in *Marron v. United States*, 275 U.S. 192 (1927) stated: "General searches have long been deemed to violate fundamental rights. It is plain that the [Fourth] Amendment forbids them." . . . "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." 275 U.S. at 195, 196.

The principles of *Marron* were applied in *Stanford v. Texas*, 379 U.S. 476 (1965). There a warrant was issued for particular premises containing "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist party of Texas and the operations of the Communist party in Texas, which are unlawfully possessed" in violation of certain extant Texas statutes. After reviewing the history and language of the Fourth Amendment, this Court suppressed the evidence seized pursuant to the warrant, because it "was a kind of which it was the purpose of the Fourth Amendment to forbid – a general warrant." 379 U.S. at 480.

Stanford, as the New Mexico Court of Appeals noted, leaves unanswered the question presented in this case:

> "We need not decide in the present case whether the description of the things to be seized would have been too generalized to pass constitutional muster, had the things been weapons, narcotics or "cases of whiskey." See *Steele v. United States No. 1*, 267, U.S. 498, 504. The point is that it was not any contraband of that kind which was ordered to be seized, but literary material. . . ." 379 U.S. at 486 (emphasis added)

Lacking guidance from this Court, lower federal courts as well as state courts are retreating from the dictates of *Marron*. *United States v. Fuller*, 441 F.2d 755 (4th Cir. 1971); *James v. United States*, 416 F. 2d 467 (5th Cir. 1969). (These cases involved warrants for the seizure of bookmaking paraphernalia and gambling paraphernalia where it was not possible to specify all the possible items which might be related to the wagering operations.)

The question which must be answered definitively by this Court is whether a description such as "any and all controlled substances kept contrary to law" is precise enough to satisfy the requirements of the Fourteenth Amendment. The problem here is not that specificity is not possible, as in *Fuller* and *James*, *supra*, but rather that it was possible but not achieved.

This question of "fishing expeditions" has not been squarely addressed by this Court since 1927 in *Marron*. The time has come to reaffirm the continuing vitality of *Marron* in response to the question left open in *Stanford*. This case offers the opportunity to do so.

The Fourth Amendment provides that:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This amendment applies to the States through the Fourteenth Amendment. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

The search warrant in this case authorized a search of El Vicio, Inc., a methadone maintenance program, the headquarters of which were located at 331 Garfield, Santa Fe, New Mexico. The command of the warrant authorizes a full-time salaried peace officer to search and seize "any and all controlled substances which may be kept there [331 Garfield] contrary to law." For this reason it is void on its face as a "general warrant" requiring the executing officer to exercise unlawful discretion to select among 120 potential substances and to *decide* which were there contrary to law.

In the case at bar, only "controlled substances" are named in the warrant. A broader category can hardly be imagined! The Controlled Substances Act covers over one hundred twenty specific materials plus their variants, from marijuana to amphetamines. Sections 54-11-6 through 54-11-10, N.M.S.A. (Supp. 1973). Certainly no "representative examples" – such as heroin – are given in the warrant which might possibly cure what is otherwise a fishing expedition. "Heroin" does not appear in the warrant at all. Yet the affidavit (included in the Appendix hereto) provides not the remotest "probable cause" to search for

any other substance. Nor are there guidelines removing discretion from the officers executing the warrant, such as the discretion to determine what is a controlled substance or what controlled substances would be kept illegally rather than legally. The "minimum standards" of specificity have not, then, been met.

The warrant in this case could easily have been more narrowly drawn to authorize seizure of specific drugs. The generality of the wording vests in the executing officers the discretion that should have been exercised by the magistrate authorizing the warrant in specifying what items may be seized. See also *Stanley v. Georgia*, 394 U.S. 557 (1969).

El Vicio (located at 331 Garfield) is a drug abuse rehabilitation program, having the legal right to possess "Schedule II" drugs, under a license granted by the State of New Mexico, and under a federal license as well. Methadone is a controlled substance which is listed in "Schedule II." Section 54-11-7(e) (11) and (12), N.M.S.A. (Supp. 1973).

At the suppression hearing, it was brought out that methadone in powdered form – a controlled substance lawfully kept on the premises – looks and tastes like heroin, a controlled substance which could not be lawfully kept on the premises. Considerable expertise would be required to distinguish between them. Thus it is no mere matter of form that the warrant contains no specifics whatsoever, no guidance for determining what substances were to be searched for and seized. The generality of the warrant goes to the very heart of the search.

The Fourth Amendment's protection against unreasonable searches and seizures is one of our most basic liberties. The states cannot be allowed to sanction the use of search warrants which, as here, are so lacking in specificity as to become general warrants. The warrant upheld by the New Mexico Court of Appeals is clearly contrary of the Fourth Amendment's guarantee, as elaborated in *Marron v. United States*.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the New Mexico Court of Appeals.

Respectfully submitted,

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APPENDIX A

Filed: September 27, 1973

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

STATE OF NEW MEXICO,
Plaintiff,
vs. No. 8873
FRANK QUINTANA,
Defendant.

JUDGMENT AND SENTENCE

The Defendant, Frank Quintana, having been tried by jury and found guilty on September 19, 1973, as charged in the Indictment filed in the above styled cause for Trafficking in a Controlled Substance in violation of Section 54-11-20, N.M.S.A., 1953 Compilation (Interim Supplement), to-wit: Heroin.

THEREAFTER, this matter coming on duly for sentencing, the Defendant appearing in person and with his attorney, J.E. Gallegos; the State of New Mexico being represented by its attorney, Bruce E. Kaufman, Deputy District Attorney; and the Court having inquired of the defendant and no just cause being shown why sentence should not be pronounced,

IT IS, THEREFORE, THE JUDGMENT AND SENTENCE of Court that the said Defendant, FRANK QUINTANA, be confined in the New Mexico State Penitentiary for a period of ten (10) to fifty (50) years.

IT IS FURTHER ORDERED that the Defendant be given credit for time spent in custody, to-wit: nine (9) days.

s/ Edwin L. Felter
DISTRICT COURT JUDGE

NOTED BY:

Jose Cruz Castellano, Jr.

APPENDIX B

Filed: April 2, 1975

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee
v.
FRANK QUINTANA,
Defendant-Appellant

No. 1612

**APPEAL FROM THE DISTRICT COURT OF
SANTA FE COUNTY
FELTER, JUDGE**

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OPINION

HERNANDEZ, Judge

Defendant appeals his jury conviction for trafficking in heroin contrary to Section 54-11-20, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2, 1973 Supp.). He alleges two points of error:

1. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO QUASH THE SEARCH WARRANT AND TO SUPPRESS REAL EVIDENCE.
2. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AS TO THE OFFENSE OF "TRAFFICKING IN HEROIN" BECAUSE THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT A CONVICTION FOR "TRAFFICKING."

We affirm.

The facts are these: On December 7, 1972, several law enforcement officers, both city and state, went to the headquarters of the El Vicio Methadone Maintenance Program at 331 Garfield Street in Santa Fe for the purpose of executing a search warrant. The officers arrived in an unmarked car at approximately 6:30 a.m., drove around the block to observe any activity on the premises or in the neighborhood and then returned to the front of the building, parked and waited. At about 6:45 a.m., defendant arrived, parked his car, and entered the building. When the officers saw the defendant approach the building they got out of their vehicle and walked toward him. Their testimony indicates that they intended to reach him before he went into the building. There is no evidence that defendant either saw or was aware of the presence of these officers; and upon entering the building, he locked the door behind him. State Police Officer Ortiz, who was in charge of the search party, reached the two steps leading to the door just as the defendant was locking it; and when he knocked, the defendant turned and looked at him through a small window in the door. The Officer identified himself and told defendant that he had a warrant to search the premises. Defendant responded through the door that he did not want to open the door. He then turned and walked very rapidly to the opposite side of the entry room.

The room was rectangular in shape measuring approximately

18 x 20 feet. Through the window in the door, Officer Ortiz observed the defendant squat down in front of a gas heater, put his right hand in his right coat pocket and remove "what appeared to be aluminum foil." He next saw the defendant place his left hand in the other coat pocket and then throw whatever he had in both hands under the heater. At that moment the officers forced the door open and entered the building. Officer Ortiz went directly to where the defendant was squatting and reiterated his identity and purpose. Officer Ortiz then searched under the heater and retrieved two large aluminum foil packets. An examination of the packets disclosed that one contained three smaller packets, each of which contained approximately one gram of heroin. The other packet contained 30 smaller packets of heroin.

The biochemist's analysis of random samples taken from the contents of all the packets demonstrates that they contained heroin. There is no evidence as to the total weight nor as to the purity of the heroin confiscated.

Defendant's first point asserts that the search warrant fails to describe with particularity the items to be seized and therefore constitutes a general warrant in contravention of the Fourth Amendment to the Constitution of the United States which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The search warrant reads in pertinent part:

> "NOW, THEREFORE, YOU ARE HEREBY COMMANDED to make an immediate search anytime between the hours of 6:00 a.m. and 10:00 p.m. of the building described above and any appurtenant structures thereto and any and all automobiles which may be found on the premises at the time of the search and of any persons who may

> enter upon said premises or may be found there at the time of the search for any and all controlled substances which may be kept there contrary to law . . ." [Emphasis ours.]

Section 54-11-2 (E) N.M.S.A. 1953 (Repl. Vol. 8, 1973 Supp.) defines controlled substances as follows:

> " . . . 'controlled substance' means a drug, substance or immediate precursor listed in Schedules I through V of the Controlled Substances Act or regulations adopted pursuant thereto; . . . ."

Schedules I through V list approximately 148 substances.

Defendant cites *Stanford v. Texas,* 379 U.S. 476, 85 S. Ct. 506, 13 L.Ed. 2d 431 (1965), in which the items listed in the search warrant were, " . . . books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas and the operations of the Communist Party in Texas . . .". The Supreme Court of the United States reversed Stanford's conviction on the ground that it had been achieved by use of illegally seized evidence which should have been suppressed. The warrant, held the court, was a general warrant forbidden by the Fourth Amendment.

We would note, however, that the court in *Stanford* distinguishes situations involving First Amendment rights from situations not involving speech, press, religion or assembly.

> "But while the Fourth Amendment was most immediately the product of contemporary revulsion against a regime of writs of assistance, its roots go far deeper.
>
> * * * *
>
> "What is significant to note is that this history is largely a history of conflict between the Crown and the press . . . . In Tudor England Officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent, both Catholic and Puritan. In later years warrants were sometimes more specific in content, but they typically authorized the arrest

and search of the premises of all persons connected with the publication of a particular libel, or the arrest and seizure of all the papers of a named person thought to be connected with a libel.

* * * *

"In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." [Footnotes omitted.] [Emphasis ours.]

The items seized in *Stanford* were several hundred books, pamphlets and periodicals.

More appropriate to our situation is *United States v. Fuller,* 441 F.2d 755 (4th Cir. 1971). In that case, the warrant authorized search and seizure of "bookmaking records and wagering paraphernalia consisting of, but not limited to, accounting sheets, run-down sheets, betting slips, recap sheets, sports information papers, miscellaneous line notations, line sheets, books of account, checks, money orders, and United States Currency . . ." During the search two of the agents executing the warrant answered telephone calls for almost half an hour. "The callers identified themselves by number and asked for the 'line'." The agents gave them the "line" information. Line referred to the predicted point spread between teams in athletic contests. The agents testified about these telephone conversations; and defendant argued that interception of the phone calls constituted a seizure. Since the telephone inquiries had not been listed on the search warrant, the defendant urged that they were seized in violation of the Fourth Amendment. The Fourth Circuit Court of Appeals held as follows:

> "The description [of the items listed in the search warrant] is necessarily general and clearly contemplates that material relating to gambling activity but not precisely described might be seized. The intent of the generalized description is clearly to permit the seizure of any items directly related to the appellant's booking operation. The telephone calls

> answered by the agents were clearly a part of appellant's booking operation [,] and, therefore, we think within the scope of the general language of the warrant. [Footnote omitted.]
>
> "Nor do we think that a warrant which is limited to the seizure of items which are directly related to a booking operation to be the kind of general search prohibited by the Fourth Amendment. This is not a case where 'the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude [because] the "things" are books, and the basis for their seizure is the ideas which they contain'." [Citation omitted.]

Similarly, we think the opinion rendered in *James v. United States,* 416 F.2d 467 (5th Cir. 1969) undercuts appellant's reliance on *Stanford.* The search warrant in that case listed the items to be seized as: "gambling paraphernalia, including but not limited to dice, crap tables, wires, magnets, coils, solenoid switches, records, sales receipts, customers' lists, shipping orders, supplies, machine equipment, machine tools and hand tools for the manufacture of gambling paraphernalia, including but not limited to dice, crap tables and cards." One of the defendants in the *James* case sought to suppress various items seized at his home and manufacturing plant on the ground that the "search was a general exploratory one in violation of the Fourth and Fifth Amendments." The Court of Appeals held as follows:

> "The search was for the instrumentalities involved. It was not general. It was not exploratory. The place to be searched and the items to be seized were as precisely identified in the warrant as the nature of the activity permitted. When circumstances make an exact description of instrumentalities a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking."

We are of the opinion that the items to be searched for and seized in the case before us were as precisely identified in the warrant as the situation permitted considering the wide variety of drugs used by addicts in the United States. The words,

"controlled substances . . . contrary to law", used in the warrant have a definite meaning in that they refer to certain and definite lists of drugs and their derivitives. Nothing was left to the discretion of the Officers. They were commanded to seize any of the items on those lists present on the premises contrary to law, and nothing else. Heroin is one of the drugs listed, and it was heroin that the officers seized.

Finally, under defendant's first point, it is urged in the briefs that the manner in which the officers executed the warrant was improper. This contention appears to be based on the fact that the officers waited in front of the El Vicio headquarters until defendant arrived before they attempted to enter the premises. From this sequence, defendant concludes that the officers were somehow improperly motivated and that their execution of the warrant was in fact directed exclusively against this defendant. Suffice it to say that this theory of inadmissibility was never brought to the attention of the trial court, and, accordingly, defendant may not now raise it without first demonstrating plain error. See R. Evid. 103, Sec. 20-4-103, N.M.S.A. 1953 (Repl. Vol. 4, Supp. 1973). The record as it comes before us would not support a finding of error and does not support defendant's contention that the search and seizure otherwise exceeded the limitations set forth in the warrant. Compare *State v. Paul,* 80 N.M. 521, 458 P.2d 596 (Ct. App. 1969); cert. den., 80 N.M. 746, 461 P.2d 228 (1969); cert. den., 397 U.S. 1044, 90 S. Ct. 1354, 251 L.Ed. 2d 654 (1970).

Defendant's second point, that there is not substantial evidence to support a conviction for "trafficking", is likewise without merit.

Although there was no direct evidence at trial that the defendant had sold, delivered or dispensed heroin, the quantity discovered in his possession amply supports an inference on intent from the circumstances attending possession.

The applicable rule may be stated as follows:

> " . . . [T]he circumstantial evidence rule is not a concept independent of the question of whether there is substantial evidence to support the verdict. As stated in State v. Clements, 31 N.M. 620, 249 P. 1003 (1926): 'The rule in a circumstantial evidence case is but a special application of the general rule of reasonable doubt. The jury having been properly instructed as to defendant's rights, its decision is final if supported by substantial evidence. . . .' " State v. Madrid, 83 N.M. 603, 495 P.2d 383 (Ct. App. 1972).

The evidence showed that defendant was in possession of more than thirty "caps" of heroin. Defendant contends that this evidence is not inconsistent with personal use and that therefore he would be innocent of the charge of possession with intent to distribute a controlled substance. However, it was adduced as part of the state's case that defendant was not, nor had he ever been, a heroin addict or user; the defendant testified to this. The only possible inference to be drawn from the evidence is that defendant, at the least, intended to give the heroin away. This evidence is sufficient to conclude that defendant was trafficking in heroin.

The judgment of the district court is affirmed.

IT IS SO ORDERED.

s/ B. C. HERNANDEZ
Judge

I CONCUR:

s/ WILLIAM R. HENDLEY J.

LEWIS R. SUTIN, J. (Dissenting)

SUTIN, Judge (dissenting)

I dissent.

A. The search warrant should be quashed because the items seized were not described in the warrant.

The search warrant provides for the search for and seizure of "any and all controlled substances which may be kept there [headquarters of the El Vicio Methadone Maintenance Program Organization] contrary to law."

This description violates the Fourth Amendment to the Constitution of the United States and Article II, Section 10 of the New Mexico Constitution. This is a matter of first impression in New Mexico.

The Fourth Amendment reads in pertinent part:

> . . .[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . things to be seized. [Emphasis added]

The New Mexico constitutional provision reads in pertinent part:

> . . . [N]o warrant to search any place, or seize any . . . thing, shall issue without describing the . . . things to be seized . . . . [Emphasis added]

(1) The history of these provisions seek the protection of the guilty as well as the innocent.

Our forefathers adopted the Fourth Amendment to avoid serious threats to basic liberties of our people and serious threats against precious aspects of our traditional freedom. *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886) sets forth the broad historic policy underlying the Fourth Amendment. This policy, as explained in *Boyd*, has been the guide to its interpretation. The Fourth Amendment was adopted to strangle writs of assistance issued in colonial days which empowered revenue officers to search suspected places for smuggled goods. A writ of assistance was called, by James Otis,

the "worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book". 116 U.S. at 625, 6 S.Ct. at 529, 29 L.Ed. at 749.

"The whole point about the Fourth Amendment is that 'Its protection extends to offenders as well as to the law abiding,' because of its important bearing in maintaining a free society and avoiding the dangers of a police state." *Harris v. United States*, 331 U.S. 145, 171, 67 S.Ct. 1098, 1111, 91 L.Ed. 1399, 1416-17 (1947), (Frankfurter, J., dissenting). "Of course, this, like each of our constitutional guarantees, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught." 331 U.S. at 198, 67 S.Ct. at 1120, 91 L.Ed. at 1432, (Jackson, J., dissenting). See, also, *Trupiano v. United States*, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948).

We should not be indulgent towards inroads upon the Fourth Amendment. In the words of Mr. Justice Holmes, speaking for the Court, the precious constitutional rights "against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319, 322 (1920).

We must not reduce the Fourth Amendment merely to words, which can be circumvented with little effort, thus negating the protection it extends to the privacy of individual life.

(2) The words "controlled substances" in the search warrant were not sufficient to identify the items to be seized.

"The requirement of the constitutional provisions that search warrants shall particularly describe the thing to be seized necessitates a description of the property to be seized with such

certainty as to identify it. . . ." 4 Wharton's Criminal Law and Procedure, Sec. 1555 (Anderson ed., 1957), at 180.

We are confronted with the "Controlled Substances Act", Sec. 54-11-1, et seq, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2, 1973 Supp.) which contains five schedules of controlled substances. Sections 54-11-29 and 54-11-30 provide for the issuance and execution of "administrative inspection warrants". We do not determine the applicability of these sections to the present case; however, these sections can be looked to for guidance as to tne appropriateness of a description of items included in the schedules of controlled substances, which are to be seized pursuant to a search warrant.

The purpose of Secs. 54-11-29 and 54-11-30 is to broaden the power of government officials to enforce the provisions of the Controlled Substances Act. The legislature gave due concern to the necessity of describing, in the search warrant, the property intended to be seized. Because the Act contains five different schedules of drugs, Sec. 54-11-30(B) (4) provides that the warrant shall "identify the items or types of property to be seized, if any".

The search warrant in the instant case did not "identify the items or types of property to be seized", nor did it make any reference to the Controlled Substances Act. It merely provided for seizure of "any and all controlled substances".

We have held that a search warrant is valid on its face, if it appears valid to an ordinarily intelligent and informed layman. *Torres v. Glasgow,* 80 N.M. 412, 456 P.2d 886 (Ct.App. 1969). An intelligent and informed layman would not understand the meaning of "controlled substances" unless he were shown the Controlled Substances Act and he read and understood it. Even so, he would not know which items listed in the five schedules of controlled substances were the object of the search in the instant case.

A layman would know what "narcotics and dangerous drugs" are. These words have been held to be a description that is sufficient to identify the property to be seized. *Weber v.*

Superior Court for County of Santa Clara, 30 C.A.3d 810, 106 Cal.Rptr. 593 (Ct. App. 1st Dist., 1973); *People v. Henry,* 173 Colo. 573, 482 P.2d 357 (1971); *People v. Leahy,* 484 P.2d 778 (Colo. 1970); *State v. Dimmer,* 7 Wash.App. 31, 497 P.2d 613 (1972). It is not necessary to give a detailed description such as chemical composition because that is too technical. *United States v. Ketterman,* 276 A.2d 243 (D.C.App. 1971).

The object of the Fourth Amendment provision which requires a description of the "things to be seized" is to prevent overbroad generalized searches and seizures. *Bell v. State,* 482 P.2d 854 (Alaska, 1971). General searches are invalid in New Mexico. *State v. Paul,* 80 N.M. 521, 458 P.2d 596 (Ct.App. 1969).

I have uncovered no authority which has discussed the words "controlled substances" as used in a search warrant to identify the property to be seized. For cases which have held search warrants void because of overbroad language, see, *Stanford v. Texas,* 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *People ex rel McKevitt v. Harvey,* 176 Colo. 447, 491 P.2d 563 (1971); *State v. Johnson,* 160 Conn. 28, 273 A.2d 702 (1970); *Commonwealth v. Dorius,* 346 Mass. 323, 191 N.E.2d 781 (1963); *People v. Masters,* 33 A.D.2d 637, 305 N.Y.S.2d 132 (A.D. 4th Dep. 1969).

The cases relied upon in the majority opinion are distinguishable from the instant case. *United States v. Fuller,* 441 F.2d 755 (4th Cir. 1971) held that a warrant that authorizes the seizure of items directly related to a bookmaking operation is not a general search warrant that is prohibited by the Fourth Amendment. *James v. United States,* 416 F.2d 467, 473 (5th Cir. 1969) held that, "When circumstances make an exact description of instrumentalities . . . a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking."

We are not faced with analogous problems in the instant case; and even if we were, the generic class of items to be seized

would be "narcotics and dangerous drugs", not "controlled substances".

The search warrant is unlawful, because it authorized a general search, in violation of the Fourth Amendment to the United States Constitution; Article II, Section 10 of the New Mexico Constitution; and case law in New Mexico (*Paul, supra*).

(3) The item named in the affidavit as the object of the search is not named in the search warrant.

The affidavit of the police for a search warrant identifies heroin as the item covered by the Controlled Substances Act. Heroin is not mentioned in the search warrant. 1 Varon, Searches, Seizures and Immunities (1961), at 333, states:

> The law is clear that the person or place to be searched, as well as the property to be seized, must be particularly and sufficiently described in the search warrant. It is imperative to the validity of a search warrant that such descriptive requirement be obeyed.
>
> * * *
>
> It must be remembered that the affidavit made and filed before the judicial authority contains a certain description, and a search warrant is predicated thereon, and adopts the description set forth in the affidavit, with the same degree of particularity and certainty of the averments made under oath.
>
> * * *
>
> Thus, only those items which are mentioned in the affidavit, and adopted in the search warrant may be seized.

(4) The search warrant placed discretion in police officers.

We have adopted the rule that officers executing the warrant are not granted any discretion in selecting items to be seized. *State v. Paul, supra.*

El Vicio Methadone Treatment Center has legal authority to have Methadone on its premises. Methadone is a controlled

substance. Section 54-11-7(B) (11). The warrant authorized a search "for any and all controlled substances which may be kept there contrary to law." Under the five schedules set forth in the Controlled Substances Act, there are about 120 different drugs set forth. The search warrant gave the officers unlawful authority to use their discretion in deciding what substances were kept there contrary to law.

B. There is no evidence that defendant "trafficked" in a controlled substance.

Defendant was charged with a violation of Sec. 54-11-20A which reads:

> As used in the Controlled Substances Act . . . "traffic" means the:
>
> * * *
>
> (3) possession with intent to distribute any controlled substance enumerated in Schedules I or II which is a narcotic drug.

The evidence most favorable to the state shows that defendant was in possession of 30 caps of heroin, guesstimated to be between four and five grams, or about 0.155 ounces. Does this establish "intent to distribute"? There is no evidence in the record to establish or suggest that this amount of heroin is a typical amount for distribution by a seller. There is no evidence to establish how much heroin an addict might use each day, or might typically be carrying around with him. There is no evidence of attempted distribution by defendant to another, or of intent to distribute.

Defendant testified that he never sold heroin or other drugs. No conflicting evidence was presented.

In *State v. Bowers,* _____ N.M. _____, 529 P.2d 300 (Ct. App. 1974), we held that possession of 246.15 pounds of marijuana, together with defendants' activities, permitted an inference that defendants had the necessary intent to distribute and sustained a conviction for possession of marijuana with intent to distribute.

The only evidence relied on by the State in the instant case to infer an intent to distribute is defendant's statement that he was not an addict or user of heroin. This is flimsy evidence upon which to rest the conviction, given the standards we have established in *Bowers, supra*; *State v. Moreno,* 69 N.M. 113, 364 P.2d 594 (1961); *State v. Easterwood,* 68 N.M. 464, 362 P.2d 997 (1961). Only by the broadest speculation and conjecture could the jury conclude that there was intent to distribute. *State v. Romero,* 67 N.M. 82, 352 P.2d 781 (1960).

We have continually held that when circumstantial evidence is relied on to prove essential elements of the crime, such evidence must point unerringly to the defendant's guilt, and must be incapable of explanation by any reasonable hypothesis of the defendant's innocence. *State v. Malouff,* 81 N.M. 619, 471 P.2d 189 (Ct.App. 1970); *State v. Zarafonetis,* 81 N.M. 674, 472 P.2d 388 (Ct.App. 1970); *State v. Flores,* 76 N.M. 134, 412 P.2d 560 (1966).

". . . [T]he circumstantial evidence rule is not a concept independent of the question of whether there is substantial evidence to support the verdict." *State v. Madrid,* 83 N.M. 603, 605, 495 P.2d 383 (Ct.App. 1972); *State v. Duran,* 86 N.M. 594, 526 P.2d 188 (Ct.App. 1974). The circumstantial evidence set forth above is not substantial evidence that defendant trafficked in controlled substances.

Although defendant may be guilty of possession of heroin, there is no evidence to sustain the conviction for possession with intent to distribute heroin.

s/ Lewis R. Sutin
Judge

APPENDIX C

Filed: May 2, 1975

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Thursday, May 1, 1975

NO. 10444

FRANK QUINTANA,
Petitioner,
vs.
STATE OF NEW MEXICO,
Respondent

Original Proceeding on Certiorari

This matter coming on for consideration by the Court upon petition for Writ of Certiorari directed to the Court of Appeals, and the Court having considered said petition and being sufficiently adivsed in the premises;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the record in Court of Appeals Cause No. 1612 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A true copy.

s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE MAGISTRATE COURT
DIVISION ONE

IN THE MATTER OF THE
ISSUANCE OF SEARCH WARRANTS. No. 270

SEARCH WARRANT

THE STATE OF NEW MEXICO: TO ANY FULL-TIME SALARIED STATE OR COUNTY LAW ENFORCEMENT OFFICER OR MUNICIPAL POLICE OFFICER

GREETINGS:

WHEREAS, facts having been presented to me by Affidavit this date by Sgt. Reyes Montoya of the Santa Fe City Police Department and Agent Alvin Miller of the New Mexico State Police a copy of their Affidavit being attached hereto and made a part of this Search Warrant that they have probable cause to believe and do believe that certain controlled substances are being kept contrary to law at a building at 331 Garfield Street in the City of Santa Fe, State of New Mexico, which building is occupied by the El Vicio Methadone Maintenance Program Organization; and this Court finding that probable cause exists for the issuance of a Search Warrant;

NOW, THEREFORE, YOU ARE HEREBY COMMANDED to make an immediate search anytime between the hours of 6:00 A.M. and 10:00 P.M. of the building described above and any appurtenant structures thereto and any and all automobiles which may be found on the premises at the time of the search and of any persons who may enter upon said premises or may be found there at the time of the search for any and all controlled substances which may be kept there contrary to law and

if any such controlled substances are so found to bring them before this Court at 121 North Federal Place in the City of Santa Fe, New Mexico.

A copy of this warrant along with the Affidavit hereto attached must be served upon any person having custody of the premises to be searched as above described together with a receipt for any property taken from the residence and premises to be searched. A copy of this warrant and the attached Affidavit shall also be left at the residence to be searched.

Return of this warrant shall be made promptly but in no event more than three (3) days after execution of this warrant. An inventory of any property seized shall be made in the presence of Sgt. Reyes Montoya and Agent Alvin Miller the applicants for this warrant and in the presence of the person from whose possession or premises the property is taken, if said person is present or in the presence of at least one (1) credible person other than Sgt. Reyes Montoya and Agent Alvin Miller or the person from whose possession or premises the property is seized. This inventory must be signed by the officer who seizes any of the property described herein and by the person or persons whose presence the inventory is made.

GIVEN UNDER MY HAND AND SEAL this 6th day of December, 1972.

s/ Eugene E. Romero

MAGISTRATE COURT JUDGE
Division One

RETURN

I, Alvin E. Miller, the undersigned, do hereby certify that on the 7th day of December, 1972, I executed the foregoing Search Warrant at 6:50 A.M. o'clock (6:50 A.M.) left a copy with Frank Qunitana, listing thereon the things seized, and that I thereupon seized the following items, to-wit:

1. Recepit book numbers 7751 to 7799
2. Two (2) tim foils packs, one smaller pack contain white powder
3. One (1) spoon and five tim foils
4. One (1) bottle cap used as a cooker found on Freddie DeVargas
5. One (1) tin foil containing three smaller packages of white powder
6. One (1) tin foil containing thirty smaller packages of white powder
7. One plastic baggie containing one bottle cap used as a cooker and two (2) needles tied with a shoe string
8. One (1) film container which was used as a cooker.

s/ Frank Quintana

FRANK QUINTANA

Sgt. Reyes Montoya, S.F.P.D.

s/ Alvin E. Miller

Agent Alvin Miller, N.M.S.P.

PERSON whose premises were searched

APPENDIX E

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE MAGISTRATE COURT
DIVISION ONE

IN THE MATTER OF THE
ISSUANCE OF SEARCH WARRANTS. No. 270

AFFIDAVIT FOR SEARCH WARRANT

Come now Affiants and being first duly sworn and under oath state:

1. They are duly qualified electors of the County of Santa Fe, State of New Mexico and members of the Santa Fe City Police Department and the New Mexico State Police.

2. They have probable cause to believe and do believe that certain controlled substances are being kept contrary to law at a building located at 331 Garfield Street, in the City of Santa Fe, New Mexico which building is occupied by the El Vicio Methodone Maintenance Program Organization.

3. The facts and information supporting Affiants belief are:

a. Since approximately October 27, 1972, your Affiants have been conducting an investigation in the City of Santa Fe, New Mexico concerning the sale of controlled substances including heroin. Assisting Affiants in this investigation were two undercover operatives described as Informants No. 202 and No. 203. On October 26, 1972 both Informant No. 202 and No. 203 executed a signed statement at the Santa Fe Police Department which statement revealed that both Informant No. 202 and No. 203 had purchased heroin for their own use on numerous occasions from various individuals at the El Vicio Methadone Maintenance Program Center at 331 Garfield Street

in the City of Santa Fe, State of New Mexico. Your Affiants reviewed that statement dated October 26, 1972 and subsequently interviewed Informants No. 202 and No. 203 who further verified the contents of that statement concerning the purchase of heroin at the El Vicio Methadone Maintenance Program Center. Commencing October 27, 1972 Informants No. 202 and No. 203 proceeded to assist your Affiants investigating the sale of heroin in the City of Santa Fe. From that date through November 22, 1972 Informants No. 202 and No. 203 purchased heroin while under surveillance by Affiants from several persons who are either on the staff or members of the El Vicio Program.

b. The dates and persons involved in the sale of the heroin described in sub-paragraph 3a above are as follows:

1. On October 31, 1972 Informants No. 202 and No. 203 purchased heroin from Richard Villanes a staff member of the El Vicio Program. Approximately fifteen minutes prior to Informants No. 202 and No. 203 purchasing the heroin from Richard Villanes, Richard Villanes was at the El Vicio Center from where he had made the arrangements to sell the heroin to said Informants. The actual sale of this heroin took place approximately one block from the El Vicio Center.

2. On November 1, 1972 Informants No. 202 and No. 203 purchased heroin from Joe Peter Brandle a member of the El Vicio Methadone Maintenance Program.

3. On three separate occasions, being November 2nd, 4th, and 13th, 1972, Informants No. 202 and No. 203 purchased heroin from Floyd Trujillo a member of the El Vicio Methadone Maintenance Program. On the occasion of the last purchase of heroin being November 13, 1972, Floyd Trujillo advised Informant No. 202 that he (Floyd Trujillo) would have to go to the El Vicio Center to pick up the heroin which according to Informant No. 202 Floyd Trujillo did. Floyd Trujillo advised Informant No. 202 that the heroin was in the possession of Marcella Baca at the El Vicio Center and according to Informant No. 202 upon Floyd Trujillo's return from the El

Vicio Center he turned over to Informant No. 202 a quantity of heroin.

4. On November 4, 1972 a second purchase from Joe Peter Brandle was made by Informants No. 202 and No. 203.

5. On November 11, 1972, Informants No. 202 and No. 203 purchased heroin from Benny Roybal a member of the El Vicio Methadone Maintenance Program.

6. On November 13, 1972, Informant No. 202 purchased heroin from David L. Martinez a member of the El Vicio Methadone Maintenance Program. Informant No. 202 advised Affiants that the heroin which was sold to him by David L. Martinez had been just previously purchased by Martinez from Raymond Chavez a/k/a Mojado. Martinez purchased this heroin from Chavez at the El Vicio Center at 331 Garfield Street in the City of Santa Fe, State of New Mexico.

7. On November 29, 1972, Informant No. 202 while inside the El Vicio Center at 331 Garfield Street in the City of Santa Fe, New Mexico observed Marcella Baca sell what purported to be heroin to Anthony Baca. This entire transaction occurred inside the building housing the El Vicio Methadone Maintenance Program Center.

c. All of the facts related in sub-paragraph 3b above were either observed by your Affiants during their surveillance of Informants No. 202 and No. 203 or were told to your Affiants by Informants No. 202 and No. 203.

d. Together your Affiants have been furnished information by Informants No. 202 and No. 203 on at least sixteen occasions and in each instance their information proved to be reliable. Furthermore Affiants know that Informants No. 202 and No. 203 are knowledgeable of matters concerning heroin and of heroin users in the Santa Fe area as well as the operation of the El Vicio Methadone Maintenance Program. Affiants are also aware personally that Informants No. 202 and No. 203 have been members of the Methadone Maintenance Program themselves in the past.

e. On October 27, 1972, Informants No. 202 and No. 203 advised Affiants that it was common knowledge among members of the El Vicio Methadone Maintenance Program that heroin was kept in the building housed by El Vicio Center. Informants No. 202 and No. 203 advised Affiants that they were knowledgeable of these facts due to their participation in the El Vicio Methadone Maintenance Program prior to October 27, 1972. Informants No. 202 and No. 203 subsequently advised Affiants that between October 27, 1972 and the present it was common knowledge among members of the El Vicio Methadone Maintenance Program that heroin was continually kept in the building housed by the El Vicio Center.

f. On November 6, 1972, Informant No. 203 advised Affiants that Reggie Velasquez a member of the El Vicio Methadone Maintenance Program offered to take Informant No. 203 to the El Vicio Center and supply Informant No. 203 with heroin. Informant No. 203 further advised Affiants that Reggie Velasquez told Informant No. 203 that heroin was being kept at the El Vicio Center and that it was no problem to supply same to Informant No. 203. The facts related herein according to Informant No. 203 occurred on November 6, 1972.

WHEREFORE, Affiants pray this Court to issue a Search Warrant pursuant to Rule 17 of the Rules of Criminal Procedure directing that a search be conducted of the building described in paragraph 2 above for any and all controlled substances which may be kept there contrary to law and to authorize a search of all persons who may enter upon said premises and to authorize a search of all appurtenant structures, outbuildings and automobiles which may be found on said premises at 331 Garfield Street in the City of Santa Fe, State of New Mexico.

s/ Alvin E. Miller
Agent Alvin Miller, N.M.S.P.

s/ Reyes Montoya
Sgt. Reyes Montoya, S.F.P.D.

SUBSCRIBED AND SWORN to before me this 6th day of December, 1972.

s/ Helen V. Lopez
NOTARY PUBLIC

My Commission Expires:
July 14, 1974

APPENDIX F

Filed: December 28, 1972

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO,
Plaintiff,
vs. No. 8873
FRANK QUINTANA,
Defendant.

MOTION TO SUPPRESS EVIDENCE

Defendant, Frank Quintana, by his attorneys, Joan M. Friedland and Bertrand B. Prince, moves to quash a search warrant issued on December 6, 1972, authorizing a search at 331 Garfield Street, Santa Fe, New Mexico, and the person of Defendant Frank Quintana, and to suppress the articles taken by means of such search and seizure and any evidence gained by means of such search, and as grounds therefor states:

1. The affidavit on which the search warrant was issued was insufficient as a matter of law.

2. There was no probable cause for believing the existence of the grounds upon which the warrant was issued.

3. The facts set forth as probable cause in the search warrant were unlawfully obtained.

4. The affidavit upon which the warrant was issued is directed against the premises of no certain person.

5. The affidavit upon which the search warrant was issued is directed against no named person.

6. The warrant is insufficient on its face.

7. The search was unreasonable and without authority of law.

8. There was no probable cause to search Defendant Frank

Quintana, and there were no allegations setting forth probable cause in the affidavit for the search of Frank Quintana.

9. That the search of Frank Quintana was not properly incident to the arrest of Defendant Frank Quintana.

10. That there was no specification for the search of Defendant Frank Quintana in the affidavit or the search warrant.

By reason of the foregoing, said search and seizure was illegal, or in the alternative, unreasonable, in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Defendant prays that the evidence obtained by the unlawful search and seizure, and obtained in pursuance of the search under said search warrant, be suppressed.

BERTRAND B. PRINCE &
JOAN M. FRIEDLAND
Attorneys for Defendant

By: s/ Bertrand B. Prince
Bertrand B. Prince
Suite 101, Bokum Building
P. O. Box 298
Santa Fe, New Mexico 87501

I hereby certify that I mailed a copy of the foregoing Motion to Suppress Evidence to opposing counsel of record on December 28, 1972.

s/ Bertrand B. Prince
Bertrand B. Prince

APPENDIX G

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT
FOR THE COUNTY OF SANTA FE,
STATE OF NEW MEXICO

STATE OF NEW MEXICO.
Plaintiff,
vs.
No. 45613
FRANK QUINTANA,
Defendant.

TRIAL MOTION RENEWING MOTION TO SUPPRESS

The defendant, FRANK QUINTANA, by his attorneys, Jones, Gallegos, Snead & Wertheim, and pursuant to Rule 18 of the New Mexico Rules of Criminal Procedure, hereby renews his Motion to Suppress certain evidence resulting from a search and seizure on December 7, 1972, for the reasons as set out in the previous Motion, the testimony received at the suppression hearing, and the arguments set forth in the defendant's Brief filed with his Honor in support of the Motion to Suppress.

JONES, GALLEGOS, SNEAD
& WERTHEIM
Attorneys for Defendant

By s/ J. E. Gallegos
J. E. GALLEGOS
P. O. Box 2228
Santa Fe, New Mexico 87501

CERTIFICATE

The foregoing Motion was made and filed at trial and I did on the 11th day of September, 1972, hand deliver a true copy thereof to Bruce E. Kaufman, Deputy District Attorney.

s/ J. E. Gallegos
J. E. GALLEGOS

Supreme Court, U. S.
FILED
SEP 12 1975
MICHAEL RODAK, JR., CLERK

No. 74-1484

IN THE

Supreme Court of the United States

October Term, 1974

FRANK QUINTANA,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

TONEY ANAYA
Attorney General

JAY F. ROSENTHAL
Assistant Attorney General

Supreme Court Building
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Counsel for Respondent

September 4, 1975

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1484

FRANK QUINTANA,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

The respondent, State of New Mexico, respectfully prays that a writ of certiorari not issue to review the judgment of the Court of Appeals of the State of New Mexico entered on April 2, 1975.

OPINION BELOW

Respondent adopts the statement of the petitioner of the opinion below.

JURISDICTION

Respondent acknowledges that this Court has jurisdiction.

STATEMENT OF THE CASE

Respondent adopts the petitioner's statement of the case, and adds thereto the following facts, quoted from the opinion of the Court of Appeals of the State of New Mexico.

> "On December 7, 1972, several law enforcement officers, both city and state, went to the headquarters of the El Vicio Methadone Maintenance Program at 331 Garfield Street in Santa Fe for the purpose of executing a search warrant. The officers arrived in an unmarked car at approximately 6:30 a.m., drove around the block to observe any activity on the premises or in the neighborhood and then returned to the front of the building, parked and waited. At about 6:45 a.m., defendant arrived, parked his car, and entered the building. When the officers saw the defendant approach the building they got out of their vehicle and walked toward him. Their testimony indicates that they intended to reach him before he went into the building. There is no evidence that defendant either saw or was aware of the presence of these officers; and upon entering the building, he locked the door behind him. State Police Officer Ortiz, who was in charge of the search party, reached the two steps leading to the door just as the defendant was locking it; and when he knocked, the defendant turned and looked at him through a small window in the door. The officer identified himself and told defendant that he had a warrant to search the premises. Defendant responded through the door that he did not want to open the door. He then turned and walked very rapidly to the opposite side of the entry room.
>
> "The room was rectangular in shape measuring approximately 18 x 20 feet. Through the window in the door, Officer Ortiz observed the defendant squat down in front

> of a gas heater, put his right hand in his right coat pocket and remove 'what appeared to be aluminum foil.' He next saw the defendant place his left hand in the other coat pocket and then throw whatever he had in both hands under the heater. At that moment the officers forced the door open and entered the building. Officer Ortiz went directly to where the defendant was squatting and reiterated his identity and purpose. Officer Ortiz then searched under the heater and retrieved two large aluminum foil packets. An examination of the packets disclosed that one contained three smaller packets, each of which contained approximately one gram of heroin. The other packet contained 30 smaller packets of heroin.
>
> "The biochemist's analysis of random samples taken from the contents of all the packets demonstrates that they contained heroin. There is no evidence as to the total weight nor as to the purity of the heroin confiscated."

REASONS FOR DENYING THE WRIT

The petitioner, alleging a violation of the Fourth Amendment and relying on the dictates of *Marron v. United States,* 275 U.S. 192 (1927) claims that the search warrant in the instant case was defective in that it was a general warrant. The respondent, State of New Mexico, contends that the claims of the petitioner are without merit, the search warrant being not a general warrant and further, that any such question is obviated by the fact that the affidavit for the warrant was attached to the search warrant and was specifically incorporated therein by reference (Tr. 714). Further, the search warrant refers to the contraband being sought by its generic name, it being under the circumstances the only reasonable manner in which to describe the many narcotic substances being sought by the police.

The affidavit reiterated extensive specific, as well as general incidents involving dealings in drugs at the El Vicio center and

by people connected with it. These drugs were referred to in the affidavit as "controlled substances" as well as "heroin." Controlled substances to a police officer are specific, abet, if not more specific than "narcotics and dangerous drugs" approved in *Weber v. Superior Court for County of Santa Clara,* 30 C.A. 3d 810, 106 Cal. Rptr. 593 (Cal. App. 1973). The officer was left with no discretion whatsoever in the instant case. "Controlled substances" are enumerated in detail in the statutes. 54-11-1, *et seq.*, N.M.S.A., 1953 Comp. (Repl. Vol. 8, Pt. 2, 1973). The words "kept there contrary to law" are also material here. Uniquely – and properly – the return to the warrant notes that none of the quantity of methadone maintained legally in the facility's medical cabinet was seized – only various packets and containers of heroin, "cookers" and "two needles tied with a shoe string."

It must be remembered that there is a vast difference between the First Amendment right to access and the potential defendant's Fourth Amendment immunity from unreasonable search and seizure such as was alluded to in *Stanford v. Texas,* 379 U.S. 476 (1965). In *Stanford v. Texas, supra,* Mr. Justice Stewart stated:

> "In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, then the basis for their seizure is the ideas which they contain. And further, 'the point is that it was not any contraband of that kind which was ordered to be seized, but literary material "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the communist party of Texas. . ." ' " 379 U.S. at 486.

Absent a First Amendment issue as existing in *Stanford v. Texas, supra,* the strict particularity test need not be met.

United States v. Scharfman, 448 F.2d 1352 (2nd Cir. 1971); *United States v. Womack,* 509 F.2d 368 (D.C. Cir. 1972).

As noted in *Marron v. United States, supra,* the touchstone of the Fourth Amendment right is that nothing is left to the discretion of the officer executing the warrant (275 U.S. at 196). Here, the officers had no impermissible discretion.

It is axiomatic that the degree of specificity required when describing the goods to be seized varies according to the circumstances and the type of items sought. *Spinelli v. United States,* 282 F.2d 871 (8th Cir. 1967), reversed on other grounds (393 U.S. 410 (1969)). The general rule is that only those items described in the search warrant may be seized though there are numerous exceptions to that rule such as those in *United States v. Zeidman,* 444 F.2d 1051 (7th Cir. 1971), *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294 (1967); *United States v. Kane,* 450 F.2d 77 (5th Cir. 1971), *cert. denied,* 405 U.S. 934 (1972); *United States v. Mahler,* 442 F.2d 1171 (9th Cir. 1970), *cert. denied,* 404 U.S. 993 (1971), concerning the seizing of evidence that has a nexus with the crime under investigation. Further, in the instant case the search warrant expressly incorporated the affidavit in specifying the items to be seized, which obviates any defect under *Marron, supra. Huffman v. United States,* 470 F.2d 386 (D.C. Cir. 1971).

The search warrant specifies "controlled substance which may be kept there contrary to law." Such a description clearly can only describe the generic class of items the officers were seeking, in particular when an exact description is generally impossible as it was in the instant case. *James v. United States,* 416 F.2d 467 (5th Cir. 1969), *cert. denied,* 397 U.S. 907 (1970).

CONCLUSION

For the aforestated reasons, a writ of certiorari should not issue.

Respectfully submitted,

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